JD–211–97
Portage, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BETA STEEL CORPORATION Case 25–CA–25139

and

DENNIS HOLLAND,
An Individual

Walter Steele, Esq.,
for the General Counsel.[1]

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Valparaiso, Indiana on October 27 & 28, 1997. The charge was filed January 14, 1997, and the complaint was issued on June 30, 1997.

On the entire record, including my observation of the demeanor of the witnesses, I make the following[2]

Findings of Fact

I. Jurisdiction

Respondent, a corporation, engages in the processing of steel at its facility in Portage, Indiana, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside of the State of Indiana. It also annually sells and ships goods valued in excess of $50,000 directly to points outside of Indiana. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Local 2038 of the International Longshoremen's Association is a labor organization within the meaning of section 2(5) of the Act.

[1] As discussed below, Respondent and its counsel, Terry R. Boesch, Esq. of Valparaiso, Indiana did not appear at the hearing.

[2] The General Counsel waived its opportunity to file a brief.

II. Alleged Unfair Labor Practices

The General Counsel alleges and Respondent admits that on or about September 13, 1996, Beta Steel Corporation discharged Dennis Holland. The General Counsel alleges that the discharge violated sections 8(a)(1) and (3) of the Act because it was made in retaliation for the filing of safety complaints by Holland in August and September, 1996. He contends further that Holland's safety complaints were related to a collective bargaining agreement between Local 2038 of the International Longshoremen's Association and Respondent.

Pre-Hearing Conference Calls

Two conference calls between Counsel for Respondent, Terry R. Boesch, Counsel for the General Counsel, Walter Steele and myself, were conducted during the week prior to hearing. The first occurred on Tuesday afternoon, October 21. During this call, Mr. Boesch informed me he had just received a subpoena duces tecum from the General Counsel asking for the personnel records of all of Respondent's employees who had been disciplined and discharged in the last 5 years and all the company's safety records for the last 5 years. Respondent's counsel indicated he would move to revoke the subpoena as being unduly burdensome and for seeking information not calculated to lead to any relevant evidence.

After some discussion as to what the General Counsel was looking for in these documents, I informed the parties that I would not require Respondent to produce the personnel files.[3] Instead, I would require Respondent to make the files available to the General Counsel for inspection during the four weeks after the hearing began and I would leave the record open so that the General Counsel could introduce any evidence, relevant to the issues in this case, that indicated disparate treatment of Mr. Holland. As to the safety records, I indicated that I would require Respondent to produce only those records for the period September 1, 1995 through September 30, 1996.

During this conversation, Mr. Boesch informed opposing counsel and myself that he had sought injunctive relief in the United States District Court in Hammond, Indiana seeking to stay the hearing. Mr. Boesch alleged that he was promised the names of the General Counsel's witnesses and their statements in advance of hearing by Board agent Andrew Stites. He alleged further that he would not have made Respondent's management personnel available to the Board investigator but for this promise.

I told Mr. Boesch that I had no authority to order the General Counsel to provide him such information in advance of trial. I cited the Board's long-standing practices against discovery and pre-trial disclosure, and its regulations, particularly, section 102.118. Further, I told him that if Mr. Stites made such representations he had no authority to do so. I also suggested that if such promises were made, no attorney could reasonably rely on them given the Board's regulations and long-standing practices. I informed the parties that the hearing would begin at 1:00 p.m. Central Standard Time of Monday, October 27. Mr. Boesch ended the conversation by giving myself and opposing counsel directions to the Porter County Administration Center, where the hearing was scheduled.

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[3] In retrospect a more appropriate request would have been for the personnel files and any other documents relating to employees who performed work, engaged in any volunteer activities or received any payments from other sources, while claiming they were incapable of performing all or any part of their employment duties at Respondent's facility.

On the afternoon of Friday, October 24, Mr. Boesch initiated another conference call. He informed Counsel for the General Counsel and myself that the District Court was denying his motion for an injunction. We revisited his allegations regarding the promises made by Mr. Stites and I informed the parties that I would not grant a petition to revoke the General Counsel's subpoenas as modified in our prior conversation. Mr. Boesch then informed me he intended to produce neither the documents nor the management witnesses who had been subpoenaed. I informed the parties that, at trial, I might refuse to allow Respondent to present such witnesses in its case pursuant to the Board's decision in *Bannon Mills,* 146 NLRB 611, 614 n., 633-634 (1964).

Further, I told Mr. Boesch that I did not see how he would be prejudiced by the alleged failure of the General Counsel to live up to the alleged promises. I observed that he would learn the identity of the Board's witnesses at the hearing and would obtain their statements after each had testified.[4] I said that if there was some reason why Respondent could not adequately address the testimony of the General Counsel's witnesses during the week of October 27, I would leave the record open and reconvene the hearing to provide Beta Steel an opportunity to do so. Moreover, I observed that Beta had not sacrificed much in talking to the Board agent during the investigatory stage of the proceeding. I noted that it was my understanding that the Board may elect not to file a complaint after being apprised of an employer's evidence negating an unfair labor practice. Further, if an employer refuses to co-operate in the investigation, the Board may gain access to management personnel and the employer's records by subpoenaing them at hearing.

The Hearing

Respondent did not file a motion requesting a continuance of the scheduled hearing date. On October 27, 1997, I arrived at the hearing site at 1:00 p.m. Seeing nobody at the table for Respondent, I asked if Mr. Boesch was present. A lady walked up to me and, without introducing herself or providing any explanation, handed me an affidavit prepared by Mr. Boesch (Judge's Exh. 1). The affidavit suggested that neither Mr. Boesch nor his client intended to appear at the hearing. The affidavit asserted that Beta Steel was being denied its due process rights by the General Counsel's refusal to honor Mr. Stites' "promises."

Neither Mr. Boesch nor his client appeared at the hearing or otherwise attempted to get in contact with myself, the Division of Judges or the General Counsel. I asked the General Counsel to call Mr. Boesch's office. He reported to me that he did so but got no answer. At this point I instructed the General Counsel to present his evidence in support of the complaint. The Board has previously found this to be an appropriate method of proceeding when a party, with adequate notice of a hearing, fails to appear, *Bristol Manor Health Care Center,* 295 NLRB 1106 (1989).

The substance of the case

Dennis Holland worked for Beta Steel Corporation from February 1993 until September 10, 1996. He is a member of Local 2038 of the International Longshoremen's Association. All but his first 6 months with Respondent were spent in the Shipping Department. At times, he

[4] The General Counsel's attorney informed Mr. Boesch that four of his witnesses were the management officials he had subpoenaed.

worked in a scalehouse, which was located 75-100 feet from the mill. Holland rotated between a variety of tasks. Two days a week he attended the scales, one day a week he worked as "checker" verifying the accuracy on certain shipping department data. The other two days a week he drove a forklift, loading steel coils onto trucks.[5]

In late 1995 or early 1996, Donald Loomis became manager of the shipping department. The volume of traffic handled by the department increased markedly. Beta Steel began using larger " shuttle" trucks to transport the steel coils produced at the mill to the nearby Port of Indiana.

When using these larger trucks, Beta Management discontinued the practice of securing the coils to the truck with a steel chain. Holland complained to Carl Maul, the plant manager, Lee Spitka, a supervisor and Jim Hunt, Beta's safety manager, that not using the chains was dangerous. He told them an unsecured coil could go through the scalehouse walls.

Holland and two other employees, Mark Devyack and Nick Million filed a Union grievance over the practice in about February 1996. Beta then began to use one chain per coil on each truck. Two weeks after the filing of the grievance, Devyack and Million were discharged for reasons unexplained in this record. Afterwards, Respondent discontinued the practice of chaining down the coils. Both employees filed grievances over their discharge. Devyack prevailed in an arbitration but did not return to work at Beta Steel. Million also found employment elsewhere.

In March 1996, an explosion at Respondent's mill killed 3 employees and injured 9 others. Holland was in the scalehouse when the explosion occurred but had been at the mill only a few minutes earlier. He knew two of the dead workers well and talked to one, Kevin Myers, just ten minutes before the explosion.

After the explosion Respondent offered counseling to those employees who desired it and kept on its payroll a number of employees who were not ready to return to work for physical and/or emotional reasons. Holland was one of about 40 employees (out of approximately 120) who did not return to work immediately. Several weeks after the explosion he began attending counseling session with Jeffrey Robinson, a licensed social worker, who had been retained by Respondent. Holland met with Robinson weekly until he returned to work and bi-weekly until he was fired.

At the beginning of his counseling, Holland told Robinson that he was continuing to serve as a volunteer fireman in his hometown of Lake Station, Indiana. Holland had been a volunteer fireman since 1984. At work, prior to the explosion, Holland regularly wore T-shirts and caps that indicated that he was a volunteer fireman. The vehicle he drove to work was equipped with emergency lights and had license plates indicating his membership in the volunteer fire department. In 1996, he was the department's safety officer. In this capacity, he drove a fire truck or ambulance. At an accident or fire, Holland assured that all the firemen wore proper safety equipment. He received $9.50 per call and a clothing and gasoline allowance of between $150 - $200 (either annually or bi-annually).[6]

[5] The coils were 48 inches wide and apparently varied in length. They weigh between 32,000 and 36,000 pounds.

[6] The number of calls to which Holland responded varied, but appears to be approximately 2 per week.

Robinson encouraged Holland to continue performing his duties as a volunteer fireman. He told him it would be helpful in coping with the emotional trauma from the explosion. Holland returned to work on May 20, 1996. However, he declined to drive a forklift and, at Respondent's request, obtained a physician's note restricting him from doing so.

Holland discussed driving the forklift with Jeffrey Robinson. He told Robinson he was uncomfortable driving forklifts at the speeds required by his job. In early August 1996, Holland asked Respondent to allow him to resume driving forklifts. He was required to obtain a doctor's release and commenced using forklifts about August 12 or 13.

In late July or early August, Holland became chairman of a "area safety committee" for the Shipping and Banding Departments. This committee was established by the Union and Management. Its membership included supervisor Lee Spitka, safety director Jim Hunt, and several bargaining unit members.[7] Shortly thereafter, at a meeting with Respondent's safety director, James Hunt, Holland complained about the steel coils not being chained to the trucks. Supervisor Lee Spitka said employees at the loading dock would not chain the coils down and gave Holland a letter from Shipping Department manager, Don Loomis, stating that this was not required so long as the coils were adequately blocked with 4 X 4 pieces of wood (dunnage).

On August 27, Holland was summoned to the office of Beta Steel vice-president, "Toli" Fliakos. Fliakos informed Holland that he'd learned that Holland had been answering calls as a fireman while he was off of work from Beta and while on restricted duty. Fliakos said he considered this an abuse of the program set up to accommodate employees after the explosion. Holland responded that he had made no attempt to hide the fact that he was still working as a volunteer fireman and nobody from Beta had asked him about it. Fliakos told Holland that he would not be disciplined but that the company was unhappy with his conduct.[8]

On September 10, one of Holland's co-workers, Mike Tsampis, asked him for a safety and health suggestion form. After Holland provided the form, Tsampis filled it out. His primary suggestion was that shuttle trucks have one chain securing each steel coil before exiting the mill (G.C. Exh. 8). Holland also signed the form and took it to supervisor Lee Spitka.

One hour later, Holland was called to Fliakos' office where he was informed that he was being suspended, subject to discharge, for answering fire department calls while he was off of work. Holland told Fliakos that his activity with the fire department was not gainful employment.

On September 13, Holland and Union officials met with management in a second step grievance proceeding. Holland presented management with a letter from Jeffrey Robinson confirming that he encouraged Holland to continue his work with the fire department and opining that it helped him prepare for his return to work (G.C. Exh. 10). Holland also reiterated the minimal compensation he received from the fire department.

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[7] Several area safety committees were apparently established a few months after the March 1996 explosion. They are referred to in the collective bargaining agreement that became effective on January 1, 1997 (Exh. General Counsel 12, pp. 29-30).

[8] In April or May 1996 the Union sent its members a letter stating that employees, who were working elsewhere while being paid by Beta Steel during their recuperation, were violating the Union's agreement with the company. This letter was sent after Fliakos raised his concern about this issue with the Union.

Fliakos also expressed his anger at Jeffrey Robinson, who attended this meeting. Robinson had told Fliakos in a telephone conversation after Holland's discharge that he didn't consider Holland's work with the fire department to be inconsistent with his inability to perform his job at the scene of the March explosion or his hesitancy to drive a forklift at the same site. Fliakos yelled at Robinson expressing his disagreement with that opinion and telling Robinson he should have talked to Fliakos before writing any letter on Holland's behalf.

After the step 2 grievance, Beta confirmed its decision to terminate Holland. The Union informed him that it did not have the resources to pursue his case to arbitration. On January 14, 1997, Holland filed an unfair labor practice charge with the NLRB.

Analysis

In order to prove that an employer violated Section 8(a)(1) and (3) in terminating an employee, the General Counsel must show that union activity has been a substantial factor in the employer's decision. Then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in Union or other protected activity. *Wright Line,* 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

To establish discriminatory motivation the General counsel generally must show union or other protected activity, employer knowledge of that activity, animus or hostility towards that activity and a causally-related adverse personnel action. Inferences of knowledge,[9] animus[10] and discriminatory motivation[11] may be drawn from circumstantial evidence rather than from direct evidence.

In the instant case, Dennis Holland engaged in union activity in attempting to enforce the safety and health provisions of the collective bargaining agreement with regard to chaining down the coils. Respondent was aware of this activity. I infer animus and retaliatory motive from the fact that Beta knew of Holland's activities with the fire department two weeks before his discharge but did not act upon that knowledge until the day it was presented with a safety complaint from Holland and a fellow employee. The timing of Holland's discharge, immediately after his protected activity, strongly suggests discrimination.

The critical factor in this matter is whether I believe Holland's testimony that vice-president Fliakos discussed his work as a volunteer fireman with him on August 27 and told him that he would not be disciplined for it. Obviously one important factor in determining the credibility of this testimony is the fact that it is uncontroverted. However, I have also taken into consideration the fact that Holland eschewed the temptation to embellish his testimony regarding the events of September 10. Particularly, in the absence of any management witnesses, Holland could have fabricated testimony regarding their reaction to his protected activities. The fact that he did not do so leads me to credit his testimony about his August 27 conversation with Fliakos.

Moreover, Holland's account of this conversation is not implausible in light of several

[9] *Flowers Baking Company, Inc.,* 240 NLRB 870, 871 (1979).
[10] *Washington Nursing Home, Inc.,* 321 NLRB 366, 375 (1996).
[11] *W. F. Bolin Co. v. NLRB,* 70 F. 3d 863 (6th Cir. 1995).

factors regarding his open activities as a volunteer fireman. First of all, his service on the fire department commenced years before the March explosion. The fact that Holland was a volunteer fireman was obvious to his supervisors and co-workers from the clothing he wore and the lights and license on his vehicle. When he returned to work after the explosion, I infer that his vehicle was in the same condition as before the explosion. Further, any inquiry on the part of Respondent would have disclosed that Holland was, as before the explosion, being compensated minimally for his services. Thus, his situation was very different than that of an employee who was recuperating while on Respondent's payroll and at the same time engaged in full-time or substantially gainful part-time employment elsewhere.

My decision to credit Holland's testimony regarding the August 27 conversation with Fliakos leads me to infer that his protected activity of September 10 caused Fliakos to reconsider his decision not to discipline Holland for his activities with the fire department. Thus, I conclude that Holland would not have been discharged or disciplined but for his protected activities.

Conclusions of Law

By discharging Dennis Holland on September 13, 1996, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Dennis Holland, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Beta Steel Corporation, Portage, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2038 of the International Longshoremen's Association, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dennis Holland full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dennis Holland whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify Dennis Holland in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Portage, Indiana, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 10, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. December 11, 1997.

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Arthur J. Amchan
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 2038 of the International Longshoreman's Association or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Holland full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dennis Holland whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Dennis Holland, and WE WILL, within 3 days thereafter, notify Dennis Holland in writing that this has been done and that the discharge will not be used against him in any way.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204–1577, Telephone 317–226–7413.